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No. 99- 456

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

H. KEITH HENSON,

Petitioner,

v.

RELIGIOUS TECHNOLOGY CENTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

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December 3, 1999

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RELIGIOUS TECHNOLOGY CENTER,

Respondent.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

The Electronic Frontier Foundation (EFF) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for *writ of certiorari.* The consent of Petitioner to the filing of this brief has been obtained. Respondent has refused consent.

EFF is a privately funded, nonprofit organization concerned with the civil liberties, technical and social issues raised by the application of new computing and

telecommunications technologies. EFF was founded in 1990 to work in that area where technology and policy converge. As such, we are uniquely able to comment on the harm that a mechanistic application of copyright law can have for free expression on the Internet. Over the past decade, EFF has participated in precedent-setting legal cases, has worked to ensure that any legislation passed or rules promulgated protect individuals' rights, and has led public debate over the equitable use and growth of technology.

Accordingly, we have a vital interest in the instant case, which threatens to silence critics of our government and religious groups. If the lower court's ruling is allowed to stand, this misuse of copyright law will cause our First Amendment rights on the Internet to be permanently harmed. Using copyright claims in this way to squelch criticism also violates the Copyright Clause and denies Petitioner his Fair Use rights.

Respectfully submitted,

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Chris Schafmeister, alt.religion.scientology - Frequently Asked Questions (FAQ): http://www.faqs.org/faqs/scientology/new-reader-faq/

INTEREST OF AMICUS CURIAE[1]

The Electronic Frontier Foundation (EFF) is a privately funded, nonprofit organization concerned with the civil liberties, technical and social issues raised by the application of new computing and telecommunications technologies. EFF was founded in 1990 to work in that area where technology and policy converge. Over the past decade, EFF has participated in precedent-setting legal cases, has worked to ensure that any legislation passed or rules promulgated protect individuals' rights, and has led public debate over the equitable use and growth of technology.

We urge the Court to grant Petitioner's writ of certiari, because Petitioner was within his First Amendment rights when he posted materials on the Internet that criticized governmental and religious activity. Furthermore, Defendant's use of copyright claims to squelch criticism violates the Copyright Clause and denies Petitioner his Fair Use rights.

SUMMARY OF ARGUMENT

While disguised as a simple copyright dispute, this case has serious ramifications to the proliferation of speech on the Internet. For the first time in history, everyday citizens have a medium through which they can disseminate criticisms of others and their government to a wide audience. While copyright law remains an important concern, the needs of copyright holders must be weighed against the rights of individuals to impart and receive accurate information. The Internet permits the dissemination of source documents, from which citizens can become informed and draw their own

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[1] *Amicus Curiae* state pursuant to Sup. Ct. Rule 37.6 that this brief was not authored in any part by counsel for any party. Moreover, no person or entity other than *amicus curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. The consent of Petitioners to this filing of this brief has been obtained. The consent of Respondents has not been refused.

conclusions. Citizens should be able to use source documents within the scope of the Fair Use doctrine.

In this case, an individual re-posted to an Internet newsgroup a two-page document (part of a 700-page allegedly copyrighted work) that attempted to support his assertions that a federal judge had made an erroneous ruling and a religious institution was engaging in illegal activity. Rather than condemn the posting as an illegal copyright infringement, EFF respectfully asks this Court to consider the broader ramifications such a ruling could have on Internet postings used for comment and criticism. True copyright violations must and should be punished. But fair use must be protected on the Internet, and the posting of a source document in support of commentary and criticism in this case was a fair use.

ARGUMENT

I. Petitioner's posting is deserving of the highest level of First Amendment protection.

(a) Petitioner's posting was a criticism of governmental power and religious activity and is of high social concern.

One of the primary purposes of the First Amendment is to protect the free discussion of governmental affairs. This includes discussion of candidates, structures and forms of government, the manner in which government is operated and all matters relating to political processes. *Mills v. Alabama, 384 U.S. 214, 218 (1966).*

Our nation was founded on the principle that freedom of expression is safeguarded by the Constitution. The opportunity to engage in free political discussion ensures that government is "responsive to the will of the people and changes may be obtained by lawful means." *Stromberg v. California, 283 U.S. 359, 369 (1931).* Justice Brandeis articulated the outcome when free speech is diminished: "Fear of punishment or retribution would discourage thought,

repression of ideas would breed hate, and hate would undermine public safety and the functioning of representative government." *Whitney v. California, 274 U.S. 357, 375 (1927).* An open and unfettered forum for public debate ensures a stable and representative government that operates on consensus and participation, rather than under suppression and tyranny.

Keith Henson's posting to the alt.religion.scientology (hereinafter a.r.s.) newsgroup and other newsgroups interested in religious issues criticized government action and the Church of Scientology (hereinafter CoS). Mr. Henson's posting, in the form of an open letter to Northern California District Court Judge Ronald Whyte, explained why he believed Judge Whyte's Temporary Restraining Order prohibiting criticism of CoS in a related case was unconstitutional. In Mr. Henson's words, "I believe the TRO is in violation of my First Amendment rights to discuss the criminal activities of the cult of Scientology." *See Petitioner's Brief at 5.* His letter criticized the issuance of the TRO and justified his statements by providing several paragraphs of original text of CoS documents that showed their involvement in allegedly criminal activities.

Just as copyright law does not restrict an attorney's ability to copy two pages of a copyrighted document and attach them as an exhibit to a court brief for the purpose of providing evidence for an assertion, it cannot justify preventing those who wish to document their criticisms by providing source material so people can make their own determination as to whether or not the criticism is worthy. Without original text, it is impossible for individuals to evaluate such a claim for themselves. To hold otherwise would mean that people must always "take someone's word" about what was said in a given context.

When this Court has previously looked into restrictions on speech critical of the Government, it has held that First Amendment guarantees of free speech and press are paramount and should prevail. Justice Black commented that the Bill of Rights was offered to curtail and restrict the general powers granted to the government. *New York Times v U.S.,*

403 U.S. 713, 716 (1971). In that case, this Court refused to grant an injunction preventing newspapers from disseminating information critical of the Government in international missteps. Similarly, Henson's posting of a letter critical of the judicial treatment in another case involving the Church of Scientology warrants First Amendment protection.

Even if the Petitioner did not present his arguments articulately, and his comments were brief, this type of criticism should not be silenced. This Court commented on this very notion when it stated, "We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and press free to criticize officials and discuss public affairs with impunity. . . . These officials are responsible to the people for the way they perform their duties." *New York Times v. Sullivan,* 376 U.S. 254, 296 (1964). Nor should Henson be punished under the law for succinctly making his points. Brevity is encouraged in skilled writing. Certainly a different standard should not apply had he rambled or added unnecessary verbiage in lieu of the source documents.

Mr. Henson's posting to this newsgroup, which included some allegedly copyrighted material to support his assertion of illegal activity on the part of Respondent, achieves an important First Amendment purpose: his posting was a criticism of a religious institution and the government. As such, it is a matter of high public concern worthy of the highest level of First Amendment protection.

(b) The Internet is a medium for promoting robust communications between diverse groups of people

This Court has found that the Internet is one of the most egalitarian mediums invented and one of the greatest democratic tools of the 21st century. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 851 (1997) (hereinafter "*Reno*"). It is owned by no one, operated by no one, and allows communication across all geographic boundaries. As a medium of convergence, the Internet allows unlimited, low-cost capacity for communication of all kinds, not only

traditional print and news services, but also audio, video and still images, as well as interactive real-time dialogue. Judge Dalzell of the special three-judge District Court assigned to review the Communications Decency Act (hereinafter CDA) concluded that the Internet is "the most participatory form of mass speech yet developed – [and] is entitled to the highest protection from governmental intrusion." *Id.* at 883, 884. The Supreme Court recognized in *Reno* that the Internet is a "unique and wholly new medium of worldwide human communication" which disseminates "content as diverse as human thought." *Id.* at 852. The Court likened expression in online chat rooms to town criers with voices resonating far from the soap box, and likened expression in newsgroups having characteristics similar to traditional street pamphleteers. *Id.* at 870.

Internet activists, like traditional street pamphleteers and their progeny, are afforded the highest level of First Amendment protection, because free speech requires a "marketplace of ideas," where truth and honest debate emerge from a multiplicity of voices. *Id.* at 885. Furthermore, many voices are necessary to protect democracy by promoting the public discussion of competing ideas and fostering the people's participation in society and in their government. The Supreme Court ruled that encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship. *Id.* at 885.

In striking down the CDA in *Reno*, this Court unanimously held that government regulation of online speech would interfere with the free exchange of ideas, and the benefits of encouraging freedom of expression in a democratic society outweighed the proposed merits of censorship. *Id. at* 885. That was important two years ago when *Reno* was decided, and it is even more important today as the population of netizens continues to grow. Approximately 200 million people are now online. *Id.* at 870. Anyone with Internet access may take advantage of a wide variety of communication and information retrieval methods, including email, chat rooms, and newsgroup discussions. *Id* at 851. From a Net browser's point of view, the World Wide Web is like a vast library including millions of readily available and indexed

publications and a sprawling mall offering goods and services. *Id.* at 853.

Newsgroups such as a.r.s. play a critical role in the exchange of speech in cyberspace. Exchanges of speech in newsgroups resemble continuous conversations on any given topic and consist of anything from a few postings to conversations that last for months or years. The participants in these conversations are often opinionated and use the newsgroup forum to debate different points of view on endlessly different subjects. Other times, discussions contain day to day gossip about the day's events. Cyberspace newsgroups such as a.r.s. deserve as much protection as other forms of social debate.

The a.r.s. newsgroup was founded by former members of the Scientology organization to promote open and unabridged discussion and criticism of the Church of Scientology's teachings and practices. According to one participant:

> A.r.s often more resembles a high school lunch room than a genteel sitting room with individuals tending to show allegiance to one of several groups. Among our members we have active and semi-active Scientologists, ex-scientologists who have grown to dislike everything about Scientology, ex-scientologists who believe in the teachings but have learned to dislike the Church of Scientology, and non-scientologists like myself who for the most part believe that everything about the Scientology faith is bunkum and that the Scientology organization is not good for people. As for a.r.s being for or against Scientology, I've been participating for three years now and I often can't tell. But if I were backed against a wall I would say that the mood tends to be more against the Church of Scientology than for it.

Chris Schafmeister at http://www.faqs.org/faqs/scientology/new-reader-faq/.

Shutting down a.r.s or silencing its participants one by one, as is happening in the instant case, offends the First Amendment by chilling speech not only of the Petitioner, but also of others who follow the Church of Scientology legal cases. The Petitioner posted just two pages of a 700 page work. The countervailing interests in this case, protecting the Church of Scientology's alleged copyright to that two-page document, pales next to the severe chilling effect this would have on all future discussions in the newsgroups. EFF respectfully requests that this Court consider the damage that may be done to the Internet if the Church of Scientology is allowed to prevail in its arguments.

II. The lower court disregarded the Copyright Clause's stated goal to promote the progress of science and art in its finding that copyright claims could prevent public criticism and commentary.

The primary purpose of the Copyright Clause is to promote the progress of science and useful arts. *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) (hereinafter "*Sony*"). Copyright was intended to benefit society as a whole and improve culture. By analyzing the copyright issues presented in this case on an erroneous, mechanical, and arbitrary fashion, the lower courts have completely disregarded clearly stated principles behind the Copyright Clause of the U.S. Constitution and have stifled the very creative forces it is supposed to promote.

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. *Id.* Rather, the limited grant is a means by which an important public purpose may be achieved. *Id.* It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. *Sony* at 421.

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. *Sony* at 431-432. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Sony* at 432.

Copyright is intended to increase and not to impede the harvest of knowledge. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 545 (1985) (hereinafter "*Harper & Row*"). Because the lower court's ruling essentially means that copyright law can be used to prevent critical analysis of a work when that criticism would otherwise contribute to public discourse, it cannot be reconciled with the Copyright Act or the Constitution, and therefore it cannot stand.

Copyright law must not trump the First Amendment. This Court has held that copyrights are not superior to rights of free expression. *Rosemont Enterprises Inc. v. Random House, Inc.*, 366 F.2d 303 (CA2 1966). Furthermore, the free dissemination of information dealing with certain newsworthy historical and biographical events serves the public interest and thus outweighs copyright interests. *New York Times v. Sullivan*, 376 U.S. 254. The ability to widely quote from and refer to religious and other philosophical texts is of extraordinary public importance and demands deference to the principles behind copyright's design.

More than a century ago, this Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Baker v. Selden*, 101 U.S. 99, 103 (1880).

The CoS's claims of copyright to squelch speech critical of its teachings flies in the face of copyright's stated purpose and amounts to copyright misuse. The Ninth Circuit recently adopted the rule already accepted in other circuits that copyright misuse is a defense to copyright infringement. *Practice Management Info. v. Am. Med. Ass'n.* 133 F.3d 1140 (9th Cir. 1997). When use of copyright proves antithetical to the interests sought to be advanced by the Copyright Act, the defense of copyright misuse is available. *Id.* See also *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 978-79 (4th Cir. 1990).

From time to time, the Supreme Court has intimated that the similarity of rationales underlying the law of patents and the law of copyrights argues for a defense to an infringement of copyright based on misuse of the copyright. *See, United States v. Loew's, Inc.*, 371 U.S. 38, 44-51 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157-59 (1948); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 865 & n. 27 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980). This Court implied such a rationale in *Harper & Row* when it pointed out that "no author may copyright his ideas or the facts he narrates," and it stressed that it would be an "abuse of the copyright owner's monopoly" for copyright law to become "an instrument to suppress facts." *Harper & Row* at 559. That is precisely what is happening in this case. CoS is using copyright as a club to silence its critics.

Allowing the lower court's ruling to stand in this case would result in widespread negative impact on large groups of people. The public at large would be severely hampered in its ability to discuss and quote copyrighted works on the Internet. Over protecting intellectual property is as harmful as underprotecting it. By using copyright to purposefully

prevent unauthorized discussion or criticism over the substance of work, the law prevents copyright from ever achieving its stated objective.

III. The lower court disregarded this Court's prior rulings in finding that Petitioner's quotations and commentary were not a socially important Fair Use privileged under the Copyright Act.

Assuming, arguendo, that defendant's copyrights on the NOTS Series 34 document are valid, Keith Henson had the right to post it to Internet newsgroups as a fair use of a copyrighted work.

Fair use refers to an individual's right to use copyrighted material in a reasonable manner without the consent of copyright owner. *Harper & Row* at 549. Fair use is an express limitation to the author's exclusive rights under the statute. This Court has historically acknowledged fair use's role in copyright's overall design: "Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, 'while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science.' *Carey v. Kearsley*, 4 Esp. 168, 170, 170 Eng.Rep. 679, 681 (K.B. 1803)." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

At the doctrine's core is a fundamental belief that not all copying should be banned, particularly in socially important endeavors. The fair use privilege was originally a judicially created doctrine, but has subsequently been codified by the copyright statute. 17 U.S.C. § 107. The Copyright Act lists some uses generally considered to be a fair, such as criticism, comment, news reporting, tacking, scholarship or research. *Id.* "The Act employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given." *Campbell* at 577. Mr. Henson criticized Judge Whyte's issuance of a

Temporary Restraining Order in the *Ward* case, Religious Technology Center v. Ward, Case No. 96-20207 RMW. Clearly a socially important endeavor, this should have weighed in favor of finding Henson's use fair.

An equitable rule of reason, the task of deciding if a particular use is "fair" is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. *Harper & Row* at 560; *Sony* at 448, and n. 31. When making a determination of whether a particular use is a fair use, a court generally weighs four nonexclusive factors listed in the statute: purpose and character of the use, nature of the work, amount and substantially of the portion used, and effect on market potential. U.S.C. § 107. This Court has instructed that the factors are not to be treated in isolation, one from another. *Campbell* at 577. "All are to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 578.

The fair use doctrine thus "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

The lower courts misinterpreted the statutory factors in favor of a finding of infringement in this case. In making its determination that Keith Henson's posting infringed RTC's copyright, the lower court relied predominantly on the fact that he posted the entire article and that it had been previously unpublished. This reasoning, however, cannot withstand scrutiny. The extent of permissible copying varies with the purpose and character of the use. *Campbell* at 586. If the purpose is legitimate and the public benefit is enhanced, fair use exemptions should be granted. In *Sony*, this Court recognized that copying a work in its entirety could be considered a fair use in some circumstances. *Sony, supra*, at 417. That Keith Henson posted the entire NOTs 34 article to support the letter he wrote to Judge Whyte is not dispositive of an unfair use. The lower court disregarded this Court's

clear teaching of copyright law by ruling that the mere posting of the document necessitated a finding of copyright infringement.

The lower court also erred by giving too much weight to the fact that CoS's writings were allegedly unpublished. While the unpublished nature of a work may be a factor in the overall fair use balancing test, this Court has ruled that it is "not necessarily a determinative factor tending to negate a defense of fair use." *Harper & Row* at 554. In *Wright v. Warner Brooks, Inc.*, 953 F.2d 731 (2d Cir. 1991), the court found that despite the unauthorized use of previously unpublished quotations, consideration of the other factors favored a finding of fair use. The Second Circuit decision read *Harper & Row* as holding that unpublished works have no per se rule and that "the fair use test remains a totality inquiry, tailored to the particular facts of each case." *Id.* at 740. The authoritative Committee report, H. Rep. No. 102-836, 102d Cong., 2d Sess. 9 (1992) agrees, stating: "The word 'itself' is designed to ensure that the courts do not erect a per se rule barring any fair use of unpublished works. Each claim of fair use of an unpublished work should involve careful consideration of all four statutory factors as well as any other factors the court deems relevant. . . ."

The lower court further erred by finding that Henson's criticism was not extensive enough to merit fair use protection. This holding is in flagrant disregard for Supreme Court teaching in the field of copyright law. In *Campbell*, this unanimous Court found that when the use constitutes commentary that has critical bearing on the substance of the original, the claim to fairness for unauthorized use is stronger. *Campbell* at 580. The Court reasoned that because the copying and use could be perceived as commenting on the original or criticizing it, the claim to fair use should be given more deference. *Id.*

As in *Campbell*, Henson's unauthorized use constituted a criticism of the CoS's ideology and of a government-sanctioned restraint on speech. *Campbell* holds that when courts inquire into the amount of material copied for a critical work and it appears to be a close question, courts

should bear in mind that the goals of the copyright law are "to stimulate the creation and publication of edifying matter." *Id.* at 578. Had the lower court considered copyright's overall purpose of encouraging public learning and promoting the progress of arts of science, it would have ruled against infringement and in favor of a finding of fair use.

The lower court's reasoning cannot withstand further scrutiny on the fourth factor, effect on the market, either. Actual harm or potential for harm to the market is said to be the most significant factor in balancing a fair use analysis. *Harper* at 566. The purpose of copyright is to create incentives for creative effort. "But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit." *Sony* at 450-1.

The district court found no evidence that Henson's actions were likely to cause an adverse impact on the potential market for the Church's work. Henson's sole purpose for posting the materials was to criticize Judge Whyte and to educate the public. He did not act for personal or financial gain. Because Henson's posting was for a noncommercial purpose and no harm was demonstrated, the lower court erred in finding the use an infringement. Balancing all the factors in light of the nature of the use weighs in favor of Mr. Henson's fair use of the NOTS Series 34 document.

"The Fair Use doctrine thus permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990). The lower court should have followed this Court's teachings in analyzing the fair use factors, rather than the mechanical and arbitrary method it chose. Had it done so, it would have found that a Hensen's posting was precisely the kind of fair use that the copyright law was intended to inspire.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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